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## DISCUSSION OF RECENT DECISIONS

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—WHETHER OR NOT ONE MAY OBTAIN DAMAGES FOR BREACH OF A RACIAL RESTRICTIVE COVENANT—The Supreme Court of Oklahoma, through the medium of the case of *Correll* v. *Earley*,[1] was recently faced with the difficult task of determining whether or not one who claimed to have been injured by another with whom he had entered into a racial restrictive covenant relating to land could maintain an action for breach of covenant. The case was one in which the parties had covenanted that neither the owner, nor

1 — Okla. —, 237 P. (2d) 1017 (1951).

his successors or assigns, should sell, lease, or give away any property in the restricted area to any person of the Negro or African race, and any conveyance so made should be void and be set aside. It was claimed that the principal defendant, one of the covenanting parties, had conveyed to Earley, a financially irresponsible person, on the understanding that he was to convey to certain Negroes, which he subsequently did do. The plaintiff then brought action against the covenantor, against his grantee Earley, and the grantees named in the deed executed by Earley, seeking to have the conveyances set aside and damages assessed for the resulting alleged depreciation to the value of plaintiff's property. The plaintiff particularly relied on the theory that the harm sustained was the direct result of a conspiracy perpetrated by the defendants. While the suit was pending, the Supreme Court of the United States handed down its decision in the case of *Shelley* v. *Kraemer*.[2] The defendants thereupon demurred to plaintiff's entire petition and the trial court sustained such demurrer. Plaintiff refused to plead further, the suit was dismissed, and plaintiff then appealed directly to the Supreme Court of Oklahoma. That court, in a unanimous opinion, overruled the demurrer to the petition although it agreed that to rule the conveyance void would be a violation of the equal protection clause of the Fourteenth Amendment.[3] Regardless of this, the court decided that the covenant, standing alone, did not violate the federal constitution and, as between the parties, was to be deemed valid and binding.[4] It treated the action, considered as one for damages, as being an action not by the state but by an individual, hence not within the condemnation of the Fourteenth Amendment since that amendment does not purport to protect a citizen from the effect of discriminatory action by an individual.[5] There being no rule against a plaintiff's right to collect damages if he had been injured by reason of a breach of a valid and binding contract, it was the conclusion of the court that if, as was here charged, there existed a vicious conspiracy to induce a breach of covenant, all of the parties participating therein were to be held liable in damages.

The instant case is one of four on the question of damages in racial covenant situations which have come before reviewing courts since the

[2] 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1947).

[3] U. S. Const., Amend. 14, provides, in part, that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . not deny to any person within its jurisdiction the equal protection of the law."

[4] The court relied on Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1926), as well as the view taken in the Kraemer case that the covenant was not, *per se*, void for illegality.

[5] It was pointed out, in the Civil Rights Cases, 109 U. S. 3 at 8, 3 S. Ct. 18 at 21, 27 L. Ed. 835 at 839 (1883), that an "individual invasion of individual rights is not the subject matter of the Amendment."

decision in the Kraemer case.[6] The first of these cases, being the case of *Weiss* v. *Leaon*,[7] was predicated on substantially the same reasoning as that used in the instant case and led the Supreme Court of Missouri to uphold a complaint designed to recover damages for breach of such a covenant. In the second, that of *Roberts* v. *Curtis*,[8] a federal district court in the District of Columbia refused to grant damages on the ground that to do so would violate the spirit of the Kraemer case, but the opinion therein, unfortunately, was extremely brief. Following the instant case, the most recent decision on the subject was rendered by the Supreme Court of Michigan in the case of *Phillips* v. *Naff*.[9] That court, flatly rejecting the doctrine that damages might be obtained for breach of a covenant of the type in question, stated that to give relief in the form of damages would be tantamount to an indirect enforcement of the covenant. Imposition of damages, the court indicated, might well prove to be as effective a means of enforcement as would a decree of a court of equity declaring a conveyance void or enjoining a proposed transfer. The practical effect of awarding damages, said the court, would be to impose an unwarranted burden on the power of alienation. Furthermore, a judgment of a court assessing damages would be a form of official state action sufficient to bring it within the prohibition of the Fourteenth Amendment, for the state action there referred to extends to all forms of exercise of state power. This even division in the cases arising since the Kraemer decision invites an inquiry into the fundamental problem.

It is clear that direct restraints upon alienation, being opposed to public policy in general,[10] are to be deemed void and of no effect,[11] and the few cases which have reached a contrary result represent an extreme minority view.[12] Courts did, however, adopt a more lenient attitude toward covenants of a partially restrictive character and, prior

6 In Tovey v. Levy, 401 Ill. 393, 82 N. E. (2d) 441 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 178, the Supreme Court of Illinois, relying on the Kraemer case, held it was proper to refuse equitable enforcement of a racial restrictive covenant but no issue was reached with respect to a right to recover damages for the breach thereof. That issue remains open in Illinois.

7 359 Mo. 1054, 225 S. W. (2d) 127 (1949), noted in 30 Bost. U. L. Rev. 273, 18 Geo. Wash. L. Rev. 417, 38 Geo. L. J. 678, 63 Harv. L. Rev. 1062, 98 U. of Pa. L. Rev. 588.

8 93 F. Supp. 604 (1950).

9 — Mich. —, 52 N. W. (2d) 158 (1952).

10 See, for example, Payne v. Hart, 178 Ark. 100, 9 S. W. (2d) 1059 (1928); Voellinger v. Kirchner, 314 Ill. 398, 145 N. E. 638 (1924); Goldsmith v. Peterson, 159 Iowa 692, 144 N. W. 60 (1913); Minor v. Shipley, 21 Ohio App. 236, 152 N. E. 768 (1923); Cobb v. Moore, 90 W. Va. 63, 110 S. E. 458 (1922).

11 Simes, Future Interests, Vol. 2, §§ 444 and 447.

12 Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S. W. 247, L. R. A. 1916D 924 (1916). A restriction on alienation during the lifetime of the grantor has been held valid: Peters v. Mutual Life Ins. Co., 119 Neb. 161, 227 N. W. 917, 67 A. L. R. 1311 (1929).

to the Kraemer case, did generally enforce racial restrictive covenants,[13] treating them as a form of partial restraint only. In fact, money damages have been awarded to a vendee who purchased land relying on the vendor's fraudulent misrepresentation that the property was protected by a racial restrictive covenant when, in fact, it was not so protected.[14]

It was the contention of the plaintiff in the instant case that, while the Kraemer case prevented equitable enforcement of the covenant, the rule as to recovery of damages for a breach thereof remained the same as it would be for the breach of any other form of restrictive covenant.[15] Even if such was not the case, it was contended that an action would lie, in tort, against one who wilfully induced another to breach a contract.[16] By so contending, the plaintiff propounded questions which reach to the heart of the problem and reveal a hopeless, and yet to be resolved, conflict between two fundamental constitutional ideas, one which guarantees to every citizen a right to secure a remedy for every wrong,[17] the other which forbids any form of discriminatory action by a state government.

Leaving the immediate issue aside for the moment, the weight of authority certainly used to be that, while injunctive relief might be denied as being a matter of equitable grace rather than a matter of right, it was not improper for a court to grant damages for violation of a binding covenant, which damages, in a case like the instant one, would be measured by the difference in value, at the time of breach, between that fixed for property protected by the restriction as against the value of property left without such protection.[18] Absent illegality in the covenant, enforcement thereof by the assessment of damages produced by a breach was deemed a matter of right, provided actual damage could be shown. Many cases of the type here under consideration might well founder over the damage element, for it might not be possible to prove any devaluation in property values by reason of the presence of the excluded group in adja-

[13] Mays v. Burgess, 147 F. (2d) 869, 162 A. L. R. 168 (1945), cert. den. 325 U. S. 868, 65 S. Ct. 1406, 89 L. Ed. 1087 (1945); Fairchild v. Raines, 24 Cal. (2d) 818, 151 P. (2d) 260 (1944); Burke v. Kleiman, 277 Ill. App. 519 (1934); Meade v. Dennistone, 173 Md. 295, 196 A. 330, 114 A. L. R. 1227 (1938); Hemsley v. Sage, 194 Okla. 669, 154 P. (2d) 577 (1945).

[14] Chandler v. Ziegler, 88 Colo. 1, 291 P. 822 (1930).

[15] On the question of the right to secure an award of damages, see Welitoff v. Kohl, 105 N. J. Eq. 181, 147 A. 390, 66 A. L. R. 1317 (1929), and Womack v. Ward, 186 S. W. (2d) 619 (Tenn. App., 1945), but neither of these cases concerns a racial restrictive covenant. See also 7 R. C. L., Covenants, p. 1165 et seq., and R. C. L. Perm. Supp., p. 2149.

[16] 11 Am. Jur., Conspiracy, § 48, p. 580. The case of Shaw v. Moon, 117 Ore. 558, 245 P. 318, 45 A. L. R. 600 (1926), indicates that all persons unlawfully conspiring to injure another are to be held liable as joint tort feasors, at least as to acts done by any one of them within the scope of the joint enterprise.

[17] See, for example, Ill. Const. 1870, Art. II, § 19.

[18] Welitoff v. Kohl, 105 N. J. Eq. 181, 147 A. 390, 66 A. L. R. 1317 (1929).

cent property. Certainly, that question is too broad in scope to be answered with a word,[19] but, assuming there would be devaluation, it is necessary to return to the fundamental problem.

If the United States Supreme Court, in the Kraemer case, had flatly declared all racial restrictive covenants void on the basis of an opposition to a clear public policy, it would have resolved the basic conflict, provided it possessed the power to fix the policy of the several states, on local questions, as well as that of the United States on federal matters. If such had been the case, no person would be able to claim a right based on such a covenant or be in a position to demand his constitutionally guaranteed remedy for the asserted wrong done for, without a right, there would be no wrong. But the court did not do so, and it is questionable if it could declare a public policy for the several states in relation to local matters. It is, then, necessary to consider the other point, *i.e.* would state action, by way of assessment of damages, represent a prohibited form of state activity?

It is here, in the final analysis, that restrictive covenants must stand or fall when tested by the federal constitution. True, the prohibitions of the Fourteenth Amendment have reference to state action and not to the acts of private individuals,[20] for the amendment erects no shield against private conduct, however discriminatory.[21] On that basis, it may be said that restrictive covenants, standing alone, do not violate the Fourteenth Amendment so long as the purposes thereof are effectuated by no more than voluntary adherence thereto. Is it not clear, however, that it would be a violation of the Fourteenth Amendment for a state to enforce them by way of judicial action, regardless of the form thereof?

The Supreme Court has said that persons may, if they wish, enter into a contract that is discriminatory in nature.[22] The mere act of entering into such a contract in no way can be said to be the considered action of the state. When voluntary adherence is no longer present, when the agreement has been breached, and one party asks an agency of the state to grant relief against the breach, whether by injunction or in the form of damages, an entirely different situation appears. The state then must, necessarily, act through its agencies,[23] for it is not capable of acting in any other way. Action by a state court and of its judicial officers, serv-

19 A study of a possible decline in assessed valuations of real property for tax purposes in neighborhoods passing through a change in occupancy might reveal highly informative data on the point.

20 Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1926).

21 Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883).

22 Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C 210, Ann. Cas. 1918A 1201 (1917).

23 Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676 (1880).

ing in their official capacities, can be regarded as nothing else but state action within the meaning of the Fourteenth Amendment.[24] According to *Twining* v. *New Jersey*,[25] the judicial act of the highest court of the state, engaged in construing the state's own law, is an act of the state itself, hence it follows that where a state court, enforcing the state's own common law, reaches a result contrary to rights protected by the Fourteenth Amendment, that result is necessarily unconstitutional.[26]

The Supreme Court of Michigan, in the Phillips case, took cognizance of these concepts when it delivered what is definitely the more reasonable view on the instant problem. If state courts may be used to secure an award of damages for the breach of a racial restrictive covenant, the fear of being penalized by way of damages could prove to be just as great a deterrent against breach as would be a judicial decree enforcing the terms of the covenant. To a great extent, that result would nullify the beneficial effects of the Kraemer case.

It has been five years since the United States Supreme Court there refused to allow equitable enforcement of racial restrictive covenants. The prevailing uncertainty as to the legal liability of parties to pay damages for the breach of such covenants now virtually requires Supreme Court action to lay that uncertainty to rest. Such action should be forthcoming without delay in order to obviate those doubts which may be operating to block the free transfer of much seemingly restricted land.

R. L. GLOBOKAR

CRIMINAL LAW—EVIDENCE—WHETHER OR NOT EVIDENCE OF INCRIMINATING STATEMENTS IS ADMISSIBLE WHEN OBTAINED THROUGH USE OF A MICROPHONE CONCEALED ON THE PERSON OF AN UNDERCOVER AGENT—In the recent case of *On Lee* v. *United States*,[1] the courts were again confronted with an evidentiary problem concerning the admissibility of evidence obtained through the use of concealed scientific apparatus. The petitioner had been convicted under a two-count indictment, one count charging the offence of selling opium, the other with conspiracy to sell.[2] According to the record, petitioner operated a Chinese hand laundry with

24 Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667 (1880).

25 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908). See also Chicago, B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897).

26 Bridges v. California, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192, 159 A. L. R. 1346 (1941); American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941).

1 — U. S. —, 72 S. Ct. 967, 96 L. Ed. (adv.) 770 (1952), affirming 193 F. (2d) 306 (1951). Justices Burton, Douglas, Frankfurter and Black each wrote a dissenting opinion.

2 21 U. S. C. A. § 173 and 18 U. S. C. A. § 371.

living quarters in the rear of the store. A government "undercover" agent had once worked for petitioner and appeared to be an old friend. This agent visited the laundry one day and engaged the petitioner in conversation, at which time petitioner made some incriminating statements. Unknown to petitioner, the agent had been wired for sound, with a small microphone concealed in an inside overcoat pocket and with a small antenna running along the inside of the sleeve. A federal narcotics agent, stationed outside with a receiving set properly tuned to pick up sounds from the microphone, heard the entire conversation. A few days later, another conversation took place, this time on the sidewalk outside the laundry, and the damaging admissions were again "audited." The evidence so obtained was admitted over petitioner's contention that it should have been excluded because the manner by which it was obtained violated both the search and seizure provisions of the Fourth Amendment and Section 605 of the Federal Communications Act.[3] It was further claimed that the proof was inadmissible under the judicial power to require fair play in the enforcement of federal law. The Court of Appeals for the Second Circuit sustained the conviction by a divided court, and the United States Supreme Court granted certiorari.[4] That court, divided five to four, found (1) there had been no trespass, hence no violation of the Fourth Amendments; (2) no violation of the Federal Communications Act, as petitioner had no wireless and no wires; and (3) no abuse of "fair play," as it would be contrary to public policy to deprive the government of the benefit of petitioner's admissions simply because its officers had not played according to the rules. The conviction was, therefore, affirmed.

The conduct of law enforcement officers, when seeking to obtain evidence upon which to base a criminal prosecution, has frequently created problems, thereby forcing courts to weigh the propriety of the means used against the necessity for unhampered police processes. The use of mechanical and scientific devices, not police innovations in themselves, has similarly raised questions. Probably the simplest and oldest medium of detection, utilized without the knowledge of the accused, is that of eavesdropping, such as standing on a public walk outside of a door or window and listening to conversations within. In that situation there is no trespass and no illegal entry so, as a general rule, the conversation overheard may be introduced in evidence, both in federal and state courts, provided the evidence is relevant.[5] Evidence obtained through spies also comes within this rule,[6] but while the means used will not affect admissibility it could

[3] 47 U. S. C. A. § 605.

[4] 342 U. S. 941, 72 S. Ct. 560, 96 L. Ed. (adv.) 372 (1952).

[5] Shields v. State, 104 Ala. 35, 16 So. 85 (1894).

[6] Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928); Cohn v. State, 120 Tenn. 61, 109 S. W. 1149 (1908).

have bearing on the credibility of such evidence.[7] The admissibility of that which is overheard by a bystander to one side of a telephone conversation has likewise been governed by the rule relating to the admissibility of oral conversations,[8] provided the person testifying can positively identify the speaker.[9]

With the advent of the phonograph and other recording devices, the mechanical reproduction of conversations served to create new evidentiary problems but state courts have generally admitted evidence procured through these devices. Thus, in *State* v. *Perkins*,[10] the recording of a confession on a recording machine stationed in a room other than the one where the conversation occurred, with a microphone hidden in the speaker's room, was held admissible in evidence. In *Kilpatrick* v. *Kilpatrick*,[11] a "speak-o-phone" was used, with a microphone in the conversant's room running to an adjoining room where a man was stationed with ear phones and a recording machine, and the evidence so obtained was admitted.[12] In much the same way, evidence obtained through the use of a dictograph has been accepted.[13]

The question of the admissibility of evidence obtained by wire-tapping, on the other hand, has caused much controversy in the federal courts although, with the passage of the Federal Communications Act,[14] the question is now fairly well settled. In 1928, the United States Supreme Court, faced with the problem of wire-tapping for the first time, took jurisdiction over the case of *Olmstead* v. *United States*.[15] The defendants there concerned had been convicted for violating the National Prohibition Act. Federal officers had tapped telephone wires leading from the offices and residences of the defendants over a period of several months. When it was made to appear that all tapping had been carried on outside of the defendants' property, a divided Supreme Court held that, as there had been no trespass, there was no search and seizure in violation of the Fourth and Fifth Amendments. Fourteen years later, in *Goldman* v. *United*

[7] Shields v. State, 104 Ala. 35, 16 So. 85 (1894).

[8] Takashi v. Hecht Co., 62 App. D. C. 72, 64 F. (2d) 710 (1933).

[9] Morton v. United States, 60 F. (2d) 696 (1932); People v. Metcoff, 392 Ill. 418, 64 N. E. (2d) 869 (1946); Miles v. Andrews, 153 Ill. 262, 38 N. E. 644 (1894).

[10] 355 Mo. 851, 198 S. W. (2d) 704 (1946).

[11] 123 Conn. 218, 193 A. 765 (1937).

[12] See also Commonwealth v. Clark, 123 Pa. Super. 277, 187 A. 237 (1936).

[13] Schoborg v. United States, 264 F. 9 (1920); Brindley v. State, 193 Ala. 43, 69 So. 536 (1915); State v. Minn. Milk Co., 124 Minn. 34, 144 N. W. 412 (1913).

[14] 47 U. S. C. A. § 605, in part, states: ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

[15] 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928). Justices Brandeis, Holmes, Butler, and Stone each wrote a dissenting opinion.

*States*,[16] the issue was again presented but this time in a case where federal officers had placed a detectaphone against the outer wall of defendant's office and had listened to conversations and phone calls carried on therein. Adhering to the Olmstead decision, the court again found no trespass or unlawful entry which could violate the Fourth and Fifth Amendments. By its holding in *McGuire* v. *United States*,[17] the court limited the doctrine of trespass *ab initio* to civil actions, thereby affirming the views of the Olmstead and Goldman decisions, so as to make an actual trespass essential before a basis could be found to exclude evidence surreptitiously obtained.

With the enactment of Section 605 of the Federal Communications Act,[18] Congress displayed an intention to place a limitation upon wire-tapping methods, but it was not until the United States Supreme Court decided the case of *Nardone* v. *United States*[19] that the extent of the limitation was made clear. The court there held that the interception of telephone communications by wire-tapping was a violation of Section 605; that the term "persons," as used in the statute, included federal officers; and that the statute applied to both interstate and intrastate communications intercepted by federal officers. The court further declared that a divulgence within the purview of Section 605 would occur whenever the language of the intercepted message was recited in court. At present, however, it would appear that the burden is on the accused to prove that the wire-tapping was unlawfully employed and that a substantial part of the case against him was procured in that fashion.[20]

Although some state courts have followed the federal view on the subject, a majority of the state courts are directly opposed to the federal rule. In *People* v. *Channell*,[21] for example, the California Appellate Court held that it was not bound by the federal rule on wire-tapping, and it approved the admission of evidence obtained in that fashion.[22]

An analysis of the decisions of the United States Supreme Court on the question of the admissibility of evidence obtained through the use of scientific devices would reveal a sharp line of conflict between those judges who would encourage the use of such means as an aid to achieving the end and those judges who believe that the end cannot justify the means. While the instant decision conforms to precedent, the strong dissent of

16 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942). Justice Murphy wrote a dissenting opinion.

17 273 U. S. 95, 47 S. Ct. 259, 71 L. Ed. 556 (1927).

18 47 U. S. C. A. § 605.

19 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314 (1937).

20 See Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298 (1939), and United States v. Polakoff, 112 F. (2d) 888 (1940).

21 107 Cal. App. (2d) 192, 236 P. (2d) 654 (1951).

22 See also People v. Kelly, 22 Cal. (2d) 169, 137 P. (2d) 1 (1943); Hubin v. State, 180 Md. 279, 23 A. (2d) 706 (1942).

Justice Brandeis in the Olmstead case and the dissents of Justices Frankfurter, Burton, Douglas and Black in the instant case would indicate that the question is far from being laid at rest. Under the majority view, the adoption of trickery by federal officers will not, by itself, render evidence inadmissible in the absence of a trespass such as would make the search and seizure illegal. In opposition, the minority view would limit the extent to which federal officers may employ "dirty business" in their efforts to obtain evidence of crime. Viewed in the light of the more recent judicial policy regarding permissible methods for obtaining confessions,[23] as well as the congressional policy relating to wire-tapping, there is fair reason to believe that technical distinctions will not be permitted to prevail but that federal law enforcement officers will eventually have to act fairly even in such matters as the suppression of crime.

M. MICHAELS

HUSBAND AND WIFE—ABANDONMENT—WHETHER HUSBAND IS JUSTIFIED IN LEAVING HOME WHEN WIFE ABANDONS RELIGIOUS TENETS WHICH HUSBAND AND WIFE ESPOUSED AT TIME OF THEIR MARRIAGE—In the New York case of *Rosner* v. *Rosner*,[1] the nisi prius court was asked to consider whether, upon a wife's abandonment of the religious tenets which she and her husband espoused at the time of their marriage, the husband was justified in leaving the home and entitled to succeed in a suit for separation. The scant facts appearing in the opinion therein would indicate that the petitioner and her husband had, prior to marriage, orally agreed to establish a home in which, rather than other alternatives sometimes selected by Jewish people, the religious observances should be orthodox in character. The parties did so live for a time but petitioner began to substitute charitable and educational activities for home duties and home life, and began to press her husband to finance a medical school education for her to further her plans for social work. She even abandoned "Kashruth," or the serving of foods in non-contaminable dishware only, ceased to serve strictly "Kosher" foods, and refused to participate in other orthodox rites, so that the husband and their daughter could no longer partake of home life like that which originally had been planned. These events caused the husband to leave the home, whereupon the wife sued for a separation decree in her favor. The husband countered with a cross-complaint for separation, basing his action on an alleged constructive abandonment. He appears to have been successful in his request, thereby

[23] McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943).

[1] — Misc. —, 108 N. Y. S. (2d) 196 (1952). It does not appear that any appeal has been taken therein.

posing a problem concerning the extent to which the free exercise of religious worship may run counter to the desire to maintain and preserve the marital status of the parties.

It was President Jefferson, according to a quotation in *Reynolds* v. *United States,* who said: ". . . religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; I contemplate with sovereign reverence that act of the American people . . . building a wall of separation between church and state."[2] To him, and to others who have made similar utterances, is attributable the noticeable lack of judicial decisions in the United States bearing upon legal problems involving religious aspects. But the courts are beginning to be caught up in a net of problems produced by a rise in the number of inter-faith marriages and are having difficulty therewith by reason of the phenomenon described by sociologists as the "cultural lag." It is not surprising, therefore, that no clear-cut precedent exists by which to settle the instant problem, although it represents a situation which is likely to be forced upon the courts for solution more and more frequently in the future.

Treating the problem simply as one involving desertion, without regard to the religious aspects, it would appear that purported distinctions as to purpose and scope have been made between desertion and abandonment,[3] but such distinctions have not been given credence in statutory enactments nor have they been favored by text writers who have carefully examined the problem.[4] The essence of the offense lies in the separation of the married parties for a length of time, the period being frequently designated by statute, without justification, either in the form of consent or by the wrongful conduct of the complainant, and with the intention of not returning.[5] There is disagreement among the courts[6] and the writers[7] as to whether the marital offense must be the equivalent of a ground for divorce in order to justify the claim of desertion. Illinois has adopted a conservative view on the point,[8] one most often applied else-

2 98 U. S. 145 at 164, 25 L. Ed. 244 at 249 (1878).

3 Pierson v. Pierson, 15 N. J. Misc. 195, 189 A. 391 (1937).

4 See Schouler, Divorce Manual (Warren, Banks & Co., Albany, 1944), § 112, at p. 141.

5 Schouler, op. cit., § 111, at p. 139.

6 Compare Frank v. Frank, 178 Ill. App. 557 (1913), with Deisler v. Deisler, 59 App. Div. 207, 69 N. Y. S. 326 (1901).

7 See Keezer and Morland, Marriage and Divorce (Bobbs-Merrill, Inc., Indianapolis, 1946), § 391, at p. 458, and Schouler, op. cit., § 120, at p. 167.

8 Frank v. Frank, 178 Ill. App. 557 (1913).

where in the constructive desertion cases,[9] but that view is not universal[10] and a different viewpoint has been taken when the abandoned party is the one seeking the divorce.[11] The general nature of the conduct relied on, however, must be inconsistent with the marital relation or be such that it renders cohabitation unsafe or unbearable,[12] and courts will not sustain the withdrawal except for the gravest and most compelling reasons, reasons which involve the fundamental happiness or self-respect of the withdrawing spouse.[13] Samples of conduct which have been said to be sufficient include the putting of the husband in an asylum without just cause,[14] the abuse and neglect of the wife by the husband,[15] the failure of the husband to support the wife when able,[16] and the refusal of sexual relationships.[17] On the other hand, simple neglect[18] or failure to provide, in the absence of aggravating circumstances, has been deemed insufficient.[19] With particular regard to neglect, the neglect must, under statutory enactments, be gross in character[20] and not mere slovenliness and laziness. In Illinois, for example, it has been held that a showing of uncleanliness and laziness on the part of a wife, both with respect to herself and the children, would be insufficient to justify the husband's withdrawal from the family home.[21]

Applying these standards to controversies involving religious difficulties between the parties, the general rule which has evolved is one that treats mere differences of opinion in matters of religion as being inadequate to constitute a ground for divorce.[22] Thus, a mere neglect

9 Nelson, Divorce (Callaghan & Co., Chicago, 1945), 2d Ed. by Henderson, § 4.16, at p. 101.

10 Campbell v. Campbell, 110 Conn. 277, 147 A. 800 (1929); Kruse v. Kruse, 179 Md. 657, 22 A. (2d) 475 (1941); Poole v. Poole, 176 Md. 696, 6 A. (2d) 243 (1939); Singewald v. Singewald, 165 Md. 136, 166 A. 441 (1933); Schwartz v. Schwartz, 158 Md. 80, 148 A. 259 (1930).

11 Nelson, op. cit., at p. 102.

12 Kinsey v. Kinsey, 37 Ala. 393 (1861); Harding v. Harding, 22 Md. 337 (1864); Fera v. Fera, 98 Mass. 155 (1867); Rogers v. Rogers, 81 N. J. Eq. 479, 86 A. 935, 46 L. R. A. (N. S.) 711 (1913); Sower's Appeal, 89 Pa. St. 173 (1879).

13 Higgins v. Higgins, 222 Ala. 44, 130 So. 677 (1930); Jones v. Jones, 95 Ala. 443, 11 So. 11, 18 L. R. A. 95 (1891).

14 Osterhout v. Osterhout, 30 Kans. 746, 2 P. 864 (1883).

15 Mecke v. Mecke, 126 Kans. 760, 271 P. 275 (1928).

16 Lee v. Lee, 38 Okla. 388, 132 P. 1070 (1913).

17 Leach v. Leach, 46 Kans. 724, 27 P. 131 (1891).

18 Petty v. Petty, 147 Kans. 342, 76 P. (2d) 850 (1938).

19 Berry v. Berry, 18 Ohio N. P. (N. S.) 521 (1915).

20 Coleman v. Coleman, 68 Ohio App. 410, 41 N. E. (2d) 734 (1941); Hanover v. Hanover, 34 Ohio App. 483, 171 N. E. 350 (1929). But see Petty v. Petty, 147 Kans. 342, 76 P. (2d) 850 (1938).

21 Winterberg v. Winterberg, 177 Ill. App. 499 (1913); Hunter v. Hunter, 121 Ill. App. 380 (1905).

22 Schouler, op. cit., § 120, at p. 168.

arising from participation in religious affairs,[23] unless accompanied by barbarous and cruel treatment,[24] will be inadequate. It has, likewise, been found that disagreement as to church affiliations;[25] a change of religious beliefs and an attempt to proselytize the wife;[26] a refusal to allow the spouse and children to attend a certain church;[27] a systematic refusal to permit attendance at a certain Sunday school without a row;[28] a refusal to give up a certain church after a pre-marital promise to do so, resulting in continual bickering between the spouses;[29] or religious differences plus the breach of a pre-marital promise to attend church,[30] will be insufficient to serve as grounds for divorce or separation. In contrast thereto, there is a group of cases which hold that refusal by one spouse to cohabit with the other, following a civil ceremony but without the celebration of religious rites, entitles the other to seek relief by way of divorce or separation,[31] particularly so if both parties belong to a sect which prohibits cohabitation without a religious ceremony. The same rule has been applied in New Hampshire[32] and has been enacted into statutory form in Kentucky.[33] However, there are a few decisions to the effect that, in such situations, an annulment should be granted, as for fraud.[34] One writer has well said that the public interest in cases where no cohabitation has taken place is so substantially lessened that simple fraud should be a valid cause for terminating the incomplete marriage,[35] but Illinois has not, as yet, seen fit to recognize this distinction.[36]

It is evident that the American desire for separation between church and state has, for the most part, caused American courts to take an objective view and to apply customary civil law relating to desertion and fraud

23 Nelson, op. cit., § 3.07, at p. 52, cites Hickman v. Hickman, 10 S. W. (2d) 738 (Tex. Civ. App., 1928).

24 Johnson v. Johnson, 31 Pa. Super. 53 (1906).

25 Hickman v. Hickman, 10 S. W. (2d) 738 (Tex. Civ. App., 1928).

26 Trautman v. Krauss, 159 La. 371, 105 So. 376 (1925).

27 Lawrence v. Lawrence, 3 Paige 267 (N. Y., 1832).

28 Arnold v. Arnold, 116 Ark. 32, 170 S. W. 486 (1914).

29 Meffert v. Meffert, 118 Ark. 582, 177 S. W. 1 (1915).

30 Hickman v. Hickman, 10 S. W. (2d) 738 (Tex. Civ. App., 1928).

31 Knibbs v. Knibbs, 94 N. J. Eq. 747, 121 A. 715 (1923); Mirizio v. Mirizio, 242 N. Y. 74, 150 N. E. 605 (1926), Cane and Lehman, JJ., dissented. See also annotations in 58 A. L. R. 462, 44 A. L. R. 726, and 28 A. L. R. 1136.

32 Fitts v. Fitts, 46 N. H. 184 (1865).

33 Ky. Rev. Stat. § 403.020(f).

34 Samuelson v. Samuelson, 155 Md. 639, 142 A. 97 (1928); Aufiero v. Aufiero, 222 App. Div. 479, 226 N. Y. S. 611 (1928), noted in 76 U. of Pa. L. Rev. 1002; Watkins v. Watkins, 197 App. Div. 489, 180 N. Y. S. 860 (1920); Rozsa v. Rozsa, 117 Misc. 728, 191 N. Y. S. 868 (1922); Rubinson v. Rubinson, 110 Misc. 114, 181 N. Y. S. 28 (1920), noted in 20 Cal. L. Rev. 708. See also note on Despatie v. Despatie, 37 T. L. R. 395 (1926), in 30 Yale L. J. 756.

35 See note in 76 U. of Pa. L. Rev. 1003.

36 Hull v. Hull, 199 Ill. App. 307 (1915).

in these cases. That trend also prevails in a more carefully reasoned group of authorities wherein the gist of the action appears to rest on cruelty alleged to result from the religious practices of one spouse upon the other, or upon the family. In some of these cases objective tests of cruelty, it would seem, have been dangerously disregarded under the guise of protecting the offended spouse from religious persecution by the remedy of divorce or separation. Thus, the New Hampshire case of *Robinson* v. *Robinson*[37] held it proper to grant the husband a divorce, even though the wife was recognized to be a peaceful person and a good mother, because her practice of a certain religion, opposed by her husband, caused him to become morose and inattentive to his business, to occasionally suffer from insomnia and loss of appetite, and to become generally despondent and unhappy because of his changed marital status. Admitting that the conduct complained of was, in itself, innocent and even laudable, and was pursued from a sense of duty, the court said it still did not "afford a sufficient reason for requiring the party injured by it to submit to the destruction of health, reason, or life."[38] The Idaho case of *DeCloedt* v. *DeCloedt*[39] also held that "religious persecution" by the wife, consisting of a constant, firm pressure to join her church, vilifying the petitioner's church and its leaders, coercion to "pray the beads," and the like, which thoroughly sickened the husband, entitled him to secure a divorce on the ground of cruelty. The court there indicated that the right to practice and hold to that faith and belief which accorded with the judgment of the person must be conceded, as between husband and wife, the same after marriage as before, since that right should exist between all persons. In other cases, cruelty has been considered from an objective standpoint without regard to its basis in religion.[40] It has been said, for example, that if the result of the practice of a certain religion, considered objectively, was of a nature to threaten the defendant's wife and children with extreme poverty and loss of social status, it would constitute a ground for divorce.[41] The Arizona case of *Smith* v. *Smith*[42] reached a similar result where the wife's practice of religion, upon becoming a member of the Jehovah's Witnesses, operated to disrupt and destroy her husband's home life and family relationships.[43]

[37] 66 N. H. 600, 23 A. 362, 15 L. R. A. 121 (1891).

[38] 66 N. H. 600 at 610, 23 A. 362 at 365.

[39] 24 Ida. 277, 133 P. 664 (1913).

[40] Hammond v. Hammond, 74 Tex. 414, 12 S. W. 90 (1889).

[41] Krauss v. Krauss, 163 La. 218, 111 So. 683, 58 A. L. R. 462 (1927).

[42] 61 Ariz. 373, 149 P. (2d) 683 (1944).

[43] Two alienation of affections cases might also be noted. In Buckley v. Francis, 78 Utah 606, 6 P. (2d) 188 (1932), it was held that where a church elder kissed plaintiff's spouse as part of a religious rite such fact should have been considered in determining whether a cause of action existed under the facts there appearing.

To generalize from these investigations, it might be said that the holding in the instant case superficially tends to set a precedent for protection of religious liberty through state divorce proceedings, but it represents a potentially unhealthy development when viewed from a constitutional standpoint. True, the wording of the opinion therein emphasizes the objective results likely to flow from a refusal to conform to agreed religious practices. At worst, it is no more than mildly novel in view of the conflict which exists between the authorities generally regarding matters of justification.[44] But if state courts, in divorce or separation matters, may limit the extent of the religious practices permissible within a home, they could, by an easy step, undertake to prescribe the religious rites which are to be practiced, as well as determine the when, where and manner of their exercise. If the decision illustrates anything important, it points to the need for devoting more resource to learning enough about the degree of emotional maturity of persons contemplating marriage to enable a better prediction to be made of the chance of success therein.[45]

W. M. JAMES, JR.

JURY—RIGHT TO TRIAL BY JURY—WHETHER OR NOT STATE COURTS, IN ACTIONS ARISING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, MUST GRANT JURY TRIAL IN CONFORMITY WITH PRACTICE IN FEDERAL COURTS—The vexing problem of the extent to which state court practice must conform to federal law when actions based on federal legislation are brought in state courts was considered by the Supreme Court of the United States

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In Mohn v. Tigley, 191 Cal. 470, 217 P. (2d) 733 (1923), it was said that the fact of donations by a spouse to a certain religious sect, and the interference of its officials, in propounding its precepts, with plaintiff's management of her family home, should have been considered by the jury.

[44] It is doubtful if Illinois would reach a similar result in view of the restrictive statutory definition of desertion to be found in Ill. Rev. Stat. 1951, Vol. 1, Ch. 40, § 1. In that regard, it should be noted the New York proceeding was based on a "separation" law, under which abandonment is the gist of the action. See Clevenger. Practice Manual 1945, §§ 1165a and 1166, and Harvey v. Harvey, 175 N. Y. S. 177 (1919); DeVide v. DeVide, 174 N. Y. S. 774 (1919); Pearson v. Pearson, 173 N. Y. S. 563 (1918). See also Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. Ed. 905 (1909).

[45] One opinion, and sadly only one, was found in the course of this investigation wherein the court seemed to expect mature judgment on the part of the complaining spouse. The fact that it was rendered in 1832 may be significant. In Lawrence v. Lawrence, 3 Paige 267 at 271 (N. Y., 1832), the jurist said: "Although it was an act of great unkindness and of unreasonable oppression on the part of the husband to use his marital power in separating his wife from the church of which she was a member, and with which she preferred to worship, I have no hesitation in saying that she mistook her duty in not submitting to the oppressor if she could not win his consent by kindness and condescension. . . . A Christian wife and mother should suffer much and long before she can be justified in resorting to the doubtful and dangerous expedient of a suit for separation."

in the recent case of *Dice* v. *Akron, Canton & Youngstown Railroad Company*.[1] One of the issues in that case involved the validity of a release which had been signed by Dice, an injured railroad employee, who had begun his suit in an Ohio common pleas court under the Federal Employers' Liability Act.[2] The trial jury found for the plaintiff, but the trial judge later entered judgment notwithstanding the verdict because he found the release to be valid. That holding was reversed by the Ohio Court of Appeals, which in turn was reversed by the Ohio Supreme Court with one judge dissenting. The state supreme court held that Ohio, not federal, law governed and under the controlling Ohio law factual issues as to fraud in securing the release were properly to be decided by the judge rather than the jury. The Supreme Court of the United States then granted certiorari and, although divided five to four, it reversed the Supreme Court of Ohio. The essence of the majority holding was that the right to trial by jury on the issue of the validity of the release formed too substantial a part of the rights accorded by the federal statute to permit of its classification as a mere rule of local procedure. The opposing view was to the effect that, despite the origin of the particular claim, a state was under no duty to treat an action of the kind in question any differently than it would adjudicate a similar problem involved in a local action for negligent injury.

A seeming conflict between state and federal procedural law has arisen over many other questions beside the instant jury problem. It may be of interest to note that the federal rules have been held to prevail on such points as (1) the party who must bear the burden of proof as to contributory negligence;[3] (2) the sufficiency of evidence to establish negligence;[4] and (3) the amount of evidence necessary to take the case to the jury.[5] On the other hand, state practice has been held to

1 — U. S. —, 72 S. Ct. 312, 96 L. Ed. (adv.) 285 (1952), reversing 155 Ohio St. 185, 98 N. E. (2d) 301 (1951). Justice Frankfurter, with whom Reed, Burton, and Jackson, JJ., joined, concurred in the reversal but dissented from the reasoning of the majority on the point in question.

2 45 U. S. C. A., § 51 et seq.

3 Central Vermont R. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B 252 (1915). The court there said: ". . . it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. . . . Congress, in passing the Federal Employers' Liability Act, evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts."

4 Louisville & N. R. R. Co. v. Reverman's Adm'x, 288 Ky. 500, 15 S. W. (2d) 300 (1929). But compare with Mulligan v. Atlantic Coast Line R. Co., 104 S. C. 173, 88 S. E. 445 (1916), affirmed in 242 U. S. 620, 37 S. Ct. 241, 61 L. Ed. 532 (1917).

5 Lloyd v. Alton R. Co., 348 Mo. 1222, 159 S. W. (2d) 267 (1942), and Weaver v. Mobile & Ohio Railroad Co., 343 Mo. 223, 120 S. W. (2d) 1105 (1938).

control as to the manner of amending pleadings,[6] the manner of objecting to the sufficiency of a pleading,[7] the right to grant a partial new trial on one issue only,[8] as to the admissibility of evidence,[9] the time and manner in which a substantive right must be asserted,[10] the manner by which persons not *sui juris* may bring suit,[11] the effective operation of the statute of limitations,[12] the degree of proof necessary to upset a release,[13] and the function to be performed by the trial court in directing the preparation of proper instructions for the jury.[14]

As to the law which should control the right to trial by jury, the majority opinion in the instant case would appear to be based on two grounds, to-wit: (1) that jury trial is "part and parcel" of the remedy afforded by the Federal Employers' Liability Act, and (2) it is desirable to have uniform application of the act throughout the country.[15] On the first of these points, the leading case on the subject of the right to a jury trial in a state court in a case arising under federal legislation, until the present decision, was that of *Minneapolis & St. Louis Railroad Company* v. *Bombolis*.[16] The sole question there turned on the applicability, in a state court, of a local statute calling for a less than unanimous verdict to an action under the Federal Employers' Liability Act. The argument against such a verdict rested on the proposition that, as the right arose under federal law and was federal in character, the defendant was entitled to a jury constituted, and reaching its conclusion, according to the

6 Central Vermont R. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B 252 (1915), and Covington v. Atlantic Coast Line R. Co., 158 S. C. 194, 155 S. E. 438 (1930), cert. den. 282 U. S. 858, 51 S. Ct. 33, 75 L. Ed. 759 (1930).

7 McIntosh v. St. Louis, etc., R. Co., 182 Mo. App. 288, 168 S. W. 821 (1914).

8 Norfolk, S. R. Co. v. Ferebee, 238 U. S. 269, 35 S. Ct. 781, 59 L. Ed. 1303 (1915), affirming 163 N. C. 351, 79 S. E. 685, 52 L. R. A. (N. S.) 1114 (1913), and 167 N. C. 290, 83 S. E. 360 (1914).

9 Small v. Slocumb, 127 N. C. 464, 37 S. E. 480 (1900), and Gulf, C. & S. F. Ry. Co. v. Moser, 277 S. W. 722 (Tenn. App., 1925).

10 Atlantic Coast Line R. Co. v. Mims, 242 U. S. 532, 37 S. Ct. 188, 61 L. Ed. 476 (1917); Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 23 S. Ct. 375, 47 L. Ed. 480, 63 L. R. A. 33 (1903); Brant v. Chicago & Alton R. Co., 294 Ill. 606, 128 N. E. 732 (1920), affirming 214 Ill. App. 126 (1919).

11 Close v. Portland Terminal Co., 128 Me. 6, 145 A. 388 (1929).

12 Brinkmeier v. Missouri P. R. Co., 244 U. S. 268, 32 S. Ct. 412, 56 L. Ed. 758 (1912), affirming 81 Kan. 101, 105 P. 221 (1909).

13 Kansas City Southern Ry. Co. v. Sanford, 182 Ark. 484, 31 S. W. (2d) 963 (1930), cert. den. 283 U. S. 825, 51 S. Ct. 347, 75 L. Ed. 1439 (1931).

14 Louisville & N. R. Co. v. Holloway, 246 U. S. 525, 38 S. Ct. 379, 62 L. Ed. 867 (1918), affirming 168 Ky. 262, 181 S. W. 1126 (1916).

15 It was said that ". . . a release of rights under the Act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release." — U. S. — at —, 72 S. Ct. 312 at 314, 96 L. Ed. (adv.) 285 at 287. This would hardly affect the jury issue, however, for a judge could decide the factual situation as well as a jury, if permitted to do so.

16 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A 86, Ann. Cas. 1916E 505 (1916).

course of the common law as guaranteed by the Seventh Amendment. Pointing to the fact that the first ten amendments for the federal constitution dealt only with federal action,[17] the court held it to be a necessary corollary that the Seventh Amendment applied only to proceedings in courts of the United States and did not, in manner whatever, govern or regulate trial by jury in state courts or the standards to be there applied concerning the same.[18]

The Seventh Amendment argument was not mentioned in the majority opinion in the instant case but the Bombolis decision came in for comment when the majority indicated it might have been more in point had Ohio "abolished trial by jury in all negligence cases including those arising under the federal act."[19] That sort of argument would seem to be based on the proposition that it is better to kill a man outright rather than to submit him to the inconvenience of being merely wounded.[20] Instead of following the view of the Bombolis case, the majority appeared to prefer to rest on the holding in *Bailey* v. *Central Vermont Railway, Inc.*,[21] wherein it was said that the right to trial by jury was a "basic and fundamental feature of our system of federal jurisprudence."[22] A study of the Bailey case, however, reveals that the statement was taken from the opinion in the case of *Jacob* v. *City of New York*,[23] a suit

17 Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 55 L. Ed. 97 (1908); Brown v. New Jersey, 175 U. S. 172, 20 S. Ct. 77, 44 L. Ed. 119 (1899).

18 See Minneapolis & St. L. R. Co. v. Bambolis, 241 U. S. 211 at 217, 38 S. Ct. 595, 60 L. Ed. 961 at 963 (1916). The court also stated: ". . . it is conceded that rights conferred by Congress, as in this case, may be enforced in state courts; but it is said this can only be provided such courts, in enforcing the Federal right, are to be treated as Federal courts and must be subjected *pro hac vice* to the limitations of the Seventh Amendment. And, of course, if this principle were well founded, the converse would also be the case, and both Federal and State courts would, by fluctuating hybridization, be bereft of all real, independent existence. That is to say, whether they would be considered as state or Federal courts would, from day to day, depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject matter of the controversy which they were considering." 241 U. S. 211 at 221, 38 S. Ct. 595, 60 L. Ed. 961 at 965.

19 — U. S. — at —, 72 S. Ct. 312, 96 L. Ed. (adv.) 285 at 288.

20 In St. Louis & S. F. R. Co. v. Brown, 45 Okla. 143 at 161, 144 P. 1075 at 1081 (1914), the Supreme Court of Oklahoma said: "We apprehend that the state has the power to abolish a trial by jury altogether; and provide that all questions, both of law and of fact, should be determined by the court. Should this be done, and a suit involving a right under the Federal statute be instituted by a party in the state court, and he be denied a jury trial in accordance with state law, yet if such party, seeking to enforce his right under the Federal statute, were accorded the same mode of procedure that all citizens of the state were entitled in the enforcement of rights under the state law, it could not be successfully urged that such party was entitled to a jury trial on the ground that he was seeking to enforce a right granted to him by a federal statute." The holding therein was affirmed in 241 U. S. 223, 36 S. Ct. 602, 60 L. Ed. 966 (1916), on the strength of the Bombolis decision.

21 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (1943).

22 318 U. S. 350 at 354, 63 S. Ct. 1062, 87 L. Ed. 1444 at 1448.

23 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942).

brought in a federal district court, where the provisions of the Seventh Amendment regarding jury trial would be in full force and effect, rather than in a state court, as was true of both the Bombolis and Dice cases. It is also important to note that the Jacob case was based on the Jones Act,[24] a statute dealing with injuries inflicted on members of the merchant marine, and thereby brought into play certain special factors to be discussed below. It is true that the Bailey case does state that rights "which the act creates are federal rights protected by federal, rather than local rules of law,"[25] but that thought bears more directly on the uniformity argument and scarcely relates to the procedural question.

On the uniformity aspect, the majority opinion in the instant case declares that "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes."[26] In support of that view, the court cited the case of *Garrett* v. *Moore-McCormack Company, Inc.*,[27] one dealing with a suit brought in a Pennsylvania court predicated on the Jones Act as well as to secure maintenance and cure pursuant to admiralty law. While the Jones Act incorporates by reference all of the applicable provisions of the Federal Employers' Liability Act, and many of the cases thereunder can properly be used to illustrate principles involved in employment cases, the citation of the Garrett case provides a fine illustration of the danger which can arise from applying Jones Act decisions without thought to employers' liability cases. Speaking of the Jones Act, the court in the last mentioned case stated that the "law is to be liberally construed to carry out its full purpose, which was to enlarge admiralty's protection to its ward . . . Being an integral part of the maritime law, rights fashioned by it are to be implemented by admiralty rules not inconsistent with the Act."[28] It happens to be the admiralty doctrine, in contrast to the Pennsylvania state rule, that the responsibility is on the defendant to sustain an alleged release, rather than on the plaintiff to overcome it. It was, therefore, held that the right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in the cause of action, was a part of the very substance of the claim, and was not to be considered a mere incident to the form of procedure. But it is evident that the special concern of admiralty law for the interests

[24] 46 U. S. C. A. § 688 et seq.

[25] 319 U. S. 350 at 352, 63 S. Ct. 1062, 87 L. Ed. 1444 at 1447. Authority for that statement may be found in Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C 1 (1914), but it applies, if at all, to the uniformity argument rather than to the jury trial issue. See also L. R. A. 1915C 47 and 47 L. R. A. (N. S.) 47.

[26] — U. S. — at —, 72 S. Ct. 312, 96 L. Ed. (adv.) 285 at 287.

[27] 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942).

[28] 317 U. S. 239 at 248, 63 S. Ct. 246, 87 L. Ed. 239 at 245.

of seamen lies at the very basis of the decision. Railroad workers, on the other hand, have never been protected by any similar solicitous concern on the part of the common law. If admiralty rules are to be used to implement the Jones Act, it may obviously be necessary to require changes in state practice to effectuate the purposes of that statute, but it does not follow that similar changes would be required under the Federal Employers' Liability Act standing alone.

In further development of the uniformity argument, the Dice opinion noted that, as Congress had granted the employee a right to recover against his employer for damages negligently inflicted, state laws should not be controlling in determining what the incidents of the federal right should be. It is clear, ever since the determination laid down in the *Second Employers' Liability Cases*,[29] that state laws, insofar as they cover the same field, have been superseded, but this is true only to the extent such statutes have dealt with the nature of the employer's liability.[30] The broad statement that "federal law controls" covers too much ground if the decision therein, and in the cases resting thereon, is to be used as authority. The Federal Employers' Liability Act may operate to supersede a state statute dealing with liability but it does not, by that fact, exclude state statutes or rules dealing with the administration of state courts, provided they do not conflict with specific provisions of the Federal Employers' Liability Act.

In only one case cited by the majority, that of *Brown* v. *Western Railway of Alabama*,[31] was a rule of local procedure involved. It appeared therein that a Georgia rule of practice, similar to the common law concept, construed all pleadings most strongly against the pleader. The United States Supreme Court there said that if it failed "to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."[32] But it is a long way from picking on a petty procedural rule to reach the goal that, because a federal right is involved, the litigant is entitled to have a local tribunal operate, in all respects, as would a federal court. In fact, the

[29] Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44 (1912).

[30] The effect of federal intervention has, at times, operated to reduce rights previously enjoyed. In Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 (1914), for example, a state statute making a railroad absolutely responsible for the furnishing of safe equipment to its workers had to yield to the liability imposed by the Federal Employers' Liability Act, which conditions recovery upon a showing of the employer's negligence. See also Panhandle & S. F. Ry. Co. v. Brooks, 199 S. W. 665 (Tenn. App., 1917), and New York Cent. R. Co. v. Winfield, 244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045, Ann. Cas. 1917D 1139 (1917).

[31] 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1950).

[32] 338 U. S. 294 at 299, 70 S. Ct. 105, 94 L. Ed. 100 at 104.

majority opinion in the instant case hardly appears to have given consideration to the potential damage which could be caused by a literal extension of that doctrine. A valid question is projected whether nationwide uniformity in the application of the Federal Employers' Liability Act to the extent suggested is worth the resulting confusion likely to occur in the courts of the forty-eight states.[33] As long as local differences prevail, it should be remembered that when Congress creates a right and confers jurisdiction on the courts of the states to enforce the right "it adopts the prevailing rules of procedure in the state."[34] If that is not what is desired, the litigant is free to effectuate his remedy elsewhere for, as Justice Frankfurter once pointed out, "the Federal courts are always available."[35] If, instead, he chooses to use the local tribunal, he should be governed by the consequences attaching to his choice.

W. F. WALSH

MASTER AND SERVANT—LIABILITY OF MASTER FOR TORTS OF SERVANT—WHETHER SERVANT, AFTER AN EXTENSIVE FROLIC OF HIS OWN, CAN BE SAID TO BE ONCE MORE IN THE SCOPE OF HIS EMPLOYMENT MERELY BECAUSE HE HAS TURNED TOWARD HIS EMPLOYER'S PLACE OF BUSINESS—The recent case of *Parotto* v. *Standard Paving Company*[1] involved the Appellate Court for the First District with the much litigated problem of determining whether a servant had merely "detoured" from his route or had instead engaged in a "frolic" of his own. Defendant's servant was a truck driver who worked out of a central garage with no fixed hours. Late in the afternoon on the day of the accident, he had delivered a load of material and had returned to the very threshold of the employer's garage when his passengers, fellow employees, inveigled him into driving them to a nearby tavern. He did this and then drove to his home. He later returned, picked up the passengers and drove with them to another more distant tavern where they stayed until the early morning hours. He was en route

[33] In 21 C. J. S., Courts, § 526, the point is made that state courts are directed to enforce the following present or former federal statutes, to-wit: National Industrial Recovery Act, National Prohibition Act, laws relating to public lands, the Safety Appliance Act, Sherman Anti-Trust Act, Clayton Act, Trading With The Enemy Act, War Risk Insurance Act, Emergency Price Control Act, Housing and Rent Act of 1947, Soldiers and Sailors Civil Relief Act, and the Fair Labor Standards Act, in addition to the Federal Employers' Liability Act. The volume of litigation arising under these statutes is an indication of the degree of confusion which could be caused.

[34] Central of Georgia Ry. Co. v. Jones, 152 Ga. 92, 108 S. E. 618 (1921), cert. den. 260 U. S. 729, 43 S. Ct. 92, 67 L. Ed. 485 (1922). See also Chesapeake & O. Ry. Co. v. Meadows, 119 Va. 33, 89 S. E. 244 (1916).

[35] See dissenting opinion of Frankfurter, J., in Brown v. Western Railway of Alabama, 338 U. S. 294 at 300, 70 S. Ct. 105, 94 L. Ed. 100 at 104.

[1] 345 Ill. App. 486, 104 N. E. (2d) 102 (1952). Leave to appeal has been denied.

from this tavern to the employer's garage when the accident in suit occurred, causing severe injury to a third person, plaintiff herein. The trial jury returned a verdict in favor of the plaintiff upon which judgment was entered. The employer-defendant, who had offered no evidence, appealed and contended the trial court should have directed a verdict in its favor. The Appellate Court, however, refusing to upset the verdict, affirmed the judgment of the trial court.

While the doctrine of *respondeat superior* may have been applied from as early as Roman civil law,[2] it was not until 1834 that Baron Parke originated the nebulous concept of "frolic" and "detour" through the medium of the case of *Joel* v. *Morison*.[3] The application of these concepts to a myriad of factual situations since then has produced a decided lack of uniformity in result in this country. It is clear, however, that the proposition that the master is responsible solely because he has entrusted a vehicle to a servant, advanced in *Sleath* v. *Wilson*[4] but expressly overruled by *Mitchell* v. *Crassweller*,[5] has not been adopted in the United States.[6] In fact, in several jurisdictions, including the better reasoned Illinois cases,[7] proof by the plaintiff that the vehicle belonged to the defendant and that it was being driven by the defendant's servant at the time of the accident raises no more than a rebuttable presumption that the servant was acting within the scope of his employment.[8] Even when evidence has been offered to overcome that presumption, the court may, in cases where the deviation is slight and not unusual, determine as a

2 Radin, Handbook of Roman Law, Ch. 5, § 53.

3 6 C. & P. 501, 172 Eng. Rep. 1338 (1834). Baron Parke there indicated that a master is not responsible for injuries caused to others by his servant's unauthorized negligence while the servant was on a "frolic of his own," but "if the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible."

4 9 C. & P. 607, 173 Eng. Rep. 976 (1839).

5 13 C. B. 237, 138 Eng. Rep. 1189 (1853).

6 Patterson v. Kates, 152 F. 481 (1907); Symington v. Sipes, 121 Md. 313, 88 A. 134 (1913); Fleischner v. Durgin, 207 Mass. 435, 93 N. E. 801 (1911); Provo v. Conrad, 130 Minn. 412, 153 N. W. 753 (1915); Ursch v. Heier, 241 S. W. 439 (Mo. App., 1922); Danforth v. Fisher, 75 N. H. 111, 71 A. 535 (1908); O'Brien v. Stern Bros., 223 N. Y. 290, 119 N. E. 550 (1918); Colwell v. Aetna Bottle & Stopper Co., 33 R. I. 531, 82 A. 388 (1912).

7 Lohr v. Barkman Cartage Co., 335 Ill. 335, 167 N. E. 35 (1929); Kavale v. Morton Salt Co., 329 Ill. 445, 160 N. E. 752 (1928); Howard v. Amerson, 236 Ill. App. 587 (1925). But see Craig v. Tucker, 264 Ill. App. 521 (1932), and Cohen v. Fayette, 233 Ill. App. 458 at 462 (1924), to the effect that plaintiff must show, by a preponderance of the evidence, that the servant was not only employed but was also, at the time, acting within the scope of the employment.

8 Atlanta Laundries, Inc. v. Goldberg, 71 Ga. App. 130, 30 S. E. (2d) 349 (1944); Simpson v. Egler, 166 Minn. 501, 207 N. W. 724 (1926); Moore v. Rosemond, 238 N. Y. 356, 144 N. E. 639 (1924); Crowell v. Duncan, 145 Va. 489, 134 S. E. 576 (1926).

matter of law that the servant was still executing his master's business.[9] Conversely, where the deviation is marked and unusual, the court may determine that the servant was not on his master's business at all, but on his own.[10] Cases falling between these extremes are said to involve a question of fact which must be left to the jury.[11]

The greatest conflict in the decisions seems to arise in those cases where the servant, engaged in business for the master, has temporarily abandoned that business and subsequently has resumed, or is about to resume, his master's activities when the accident occurs. Clearly, when the servant leaves the premises on the way out to attend to some purely personal errand, as to eat supper,[12] to return home because his work is finished,[13] or because he has become ill,[14] and irrespective of whether or not he is, at the time of the accident, using a vehicle belonging to the master,[15] the decisions all indicate that the master cannot be held liable. Merely because the servant is disobeying the master's express instructions, however, is not sufficient to take the servant out of the scope of his employment[16] and if the employee's deviation consists solely in giving aid to distressed fellow travellers of the road,[17] or is undertaken at a time when the servant can be said to be engaged jointly in the business of his

9 Wagner v. Chicago Motor Coach Co., 288 Ill. App. 402, 6 N. E. (2d) 250 (1937); Craig v. Tucker, 264 Ill. App. 521 (1932); Riley v. Standard Oil Co., 231 N. Y. 301, 132 N. E. 97 (1921).

10 Boehmer v. Norton, 328 Ill. App. 17, 65 N. E. (2d) 212 (1946); Keller v. Maxwell, 256 Ill. App. 19 (1930); Szszatkowski v. Peoples Gas, Light & Coke Co., 209 Ill. App. 460 (1918).

11 Kavale v. Morton Salt Co., 329 Ill. 445, 160 N. E. 752 (1928); Carl Corpor Brewing & Malting Co. v. Huggins, 96 Ill. App. 144 (1901); Moore v. Rosemond, 238 N. Y. 356, 144 N. E. 639 (1924).

12 Pearce v. Industrial Commission, 299 Ill. 161, 132 N. E. 440 (1921); Rupp v. Walgreen Co., 270 Ill. App. 346 (1933); Orr v. Thompson Coal Co., 219 Ill. App. 116 (1920); Miller v. National Automobile Sales Co., 177 Ill. App. 367 (1913).

13 N. K. Fairbank Co. v. Industrial Commission, 285 Ill. 11, 120 N. E. 457 (1918); Clark v. Wisconsin Central Railway Co., 261 Ill. 407, 103 N. E. 1053 (1913); Cohen v. Fayette, 233 Ill. App. 458 (1924).

14 Szszatkowski v. Peoples Gas , Light & Coke Co., 209 Ill. App. 460 (1918).

15 Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387, 173 N. E. 394 (1930); Fogel v. 1324 North Clark Street Bldg. Corp., 278 Ill. App. 286 (1934); Miller v. National Automobile Sales Co., 177 Ill. App. 367 (1913); Clark v. Buckmobile Co., 107 App. Div. 120, 94 N. Y. S. 771 (1905); Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133 (1906). But see Orr v. Thompson Coal Co., 219 Ill. App. 116 (1920), which seems to distinguish between vehicles entrusted to the servant and those only allowed out under special order.

16 Keedy v. Howe, 72 Ill. 133 (1874), bartender selling liquor contrary to instructions; Toledo, Wabash & Western Ry. Co. v. Harmon, 47 Ill. 298 (1868), railroad engineer blowing whistle and frightening horses; Swancutt v. W. M. Trout Auto Livery Co., 176 Ill. App. 606 (1913), hotel cab driver picking up private passengers. See also Spice v. Autry, 184 Ind. 1, 110 N. E. 201 (1915); Whiteacre v. Chicago, R. I. & P. R. R. Co., 252 Mo. 438, 60 S. W. 1009 (1913), affirmed in 239 U. S. 421, 36 S. Ct. 152, 60 L. Ed. 360 (1915).

17 Boalbey v. Smith, 339 Ill. 466, 90 N. E. (2d) 238 (1950); Puttkammer v. Industrial Commission, 371 Ill. 497, 21 N. E. (2d) 575 (1939).

master as well as his own, there has been no complete turning away,[18] so the master-servant relationship will be considered as having continued.

Assuming that a deviation has occurred, so as to put the servant on his own responsibility, the English cases indicate that the employee remains outside his employment until he returns to the point of departure.[19] While this rule may be theoretically sound and easy to apply, it could produce unfortunate results for it is possible that the servant may have once again devoted himself exclusively to the business of the master without returning to the point of departure. While some jurisdictions in this country follow the English cases,[20] most others, including Illinois, are in conflict over the point as to whether the employee returns to the master's business as soon as he has accomplished his personal objective and starts to return[21] or at some mid-point between the return and the point of departure.[22]

The Appellate Court in the instant case preferred to follow the holding in *Kavale* v. *Morton Salt Company*,[23] a case which supports the proposition that once a return has been made, so that the servant is once more acting in the scope of his employment, liability can attach to the employer. The facts in the two cases are similar except that, in the instant case, the driver was several miles from the garage and some seven hours overdue when the accident occurred whereas, in the Kavale case, the servant was in the immediate vicinity and only three hours overdue. Neither the exact mileage of deviation nor the amount of time overdue seems to

[18] Olson Drilling Co. v. Industrial Commission, 386 Ill. 402, 54 N. E. (2d) 452 (1944); Flood v. Bitzer, 313 Ill. App. 359, 40 N. E. (2d) 557 (1942); Devine v. Ward Baking Co., 188 Ill. App. 588 (1914); Carl Corpor Brewing & Malting Co. v. Huggins, 96 Ill. App. 144 (1901); Chicago Consolidated Bottling Co. v. McGinnis, 86 Ill. App. 38 (1899); Carroll v. Beard-Laney, Inc., 207 S. C. 339, 35 S. E. (2d) 425 (1945).

[19] Mitchell v. Crassweller, 13 C. B. 237, 138 Eng. Rep. 1189 (1853); Raynor v. Mitchell, L. R. 2 C. P. 357 (1877); O'Reilly v. McCall, 2 Ir. K. B. 42 (1909).

[20] Patterson v. Kates, 152 F. 481 (1907); Symington v. Sipes, 121 Md. 313, 88 A. 134 (1913); Hartnett v. Gryzmish, 218 Mass. 258, 105 N. E. 988 (1914); Danfurth v. Fisher, 75 N. H. 111, 71 A. 535 (1908); Colwell v. Aetna Bottle & Stopper Co., 33 R. I. 531, 82 A. 388 (1912).

[21] Kavale v. Morton Salt Co., 329 Ill. 445, 160 N. E. 753 (1928); Wagner v. Chicago Motor Coach Co., 288 Ill. App. 402, 6 N. E. (2d) 250 (1937); Heelan v. Guggenheim, 210 Ill. App. 1 (1918); Barmore v. Railway Co., 85 Miss. 426, 30 So. 210 (1904); Moore v. Rosemond, 238 N. Y. 356, 144 N. E. 639 (1924); Riley v. Standard Oil Co., 231 N. Y. 301, 132 N. E. 97 (1921); Graham v. Henderson, 254 Pa. 137, 98 A. 870 (1916).

[22] McKiernan v. Lehmaier, 85 Conn. 111, 81 A. 969 (1912); Public Service Co. of Northern Illinois v. Industrial Commission, 395 Ill. 238, 69 N. E. (2d) 875 (1946); United Disposal Co. v. Industrial Commission, 291 Ill. 480, 126 N. E. 183 (1920); International Harvester Co. v. Industrial Board, 282 Ill. 489, 118 N. E. 711 (1918); Keller v. Maxwell, 256 Ill. App. 19 (1930); Brinkman v. Zuckerman, 192 Mich. 624, 159 N. W. 316 (1916); Dockweiler v. American Piano Co., 94 Misc. 712, 160 N. Y. S. 270 (1916).

[23] 329 Ill. 445, 160 N. E. 752 (1928).

have influenced the determinations concerning the scope of employment[24] and, where considered, other factors have shown the issue not really one in point.[25] The only Illinois case directly contrary to the Kavale case is that of *Public Service Company of Northern Illinois* v. *Industrial Commission*,[26] but that case may be distinguished on the ground the proceeding was one to secure workmen's compensation and the deviating employee was suing rather than some third person injured by his acts. It is possible the court therein may have felt it had to be stricter in determining the question of whether or not the employee had returned to the zone of employment. If so, this admittedly new approach may offer an ingenious explanation of the cleavage to be found in the Illinois cases.[27]

To test the validity of this approach, it becomes necessary to go back and examine the basic reasons for the *respondeat superior* doctrine as well as the principles underlying workmen's compensation statutes. Baty, after an exhaustive study to determine the reason behind the doctrine of *respondeat superior*, finally stated that, in his opinion, the real reason for the employer's liability is that "the damages are taken from a deep pocket."[28] By contrast, Seager indicates that the policy supporting workmen's compensation acts is one by which "the loss to wage earners resulting from the accidents of industry should be regarded as an expense of production which the employer should bear as he bears the other expenses of production and which, since the burden falls on all employers alike, he will be able to recover normally in the somewhat higher prices he will obtain for his goods."[29] Both doctrines appear to be the result of a practical attempt to place the loss on those who can best bear the same rather than the outcome of any philosophical or theoretical reasoning applied to the problem. Such being the case, rules founded on practicality should certainly be subject to practical distinctions. Employers should

[24] The only case in which the decision could be said to be based on either of these factors is that of Cannon v. Goodyear Tire & Rubber Co., 60 Utah 346, 208 P. 519 (1922), which case indicated that if the accident occurred after the employee had been away from his employer's business for more than five hours, even though he was returning thereto, he could not, as a matter of law, be said to be in the scope of employment.

[25] The case of Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387, 173 N. E. 394 (1930), involved a servant who had no right to use the vehicle at all. In Lohr v. Barkman Cartage Co., 335 Ill. 335, 167 N. E. 35 (1929), the servant was still on a "frolic" of his own and had made no attempt to return to his master's business. See further on this latter point: Central Garage of LaSalle v. Industrial Commission, 286 Ill. 291, 121 N. E. 587 (1918); Boehmer v. Norton, 328 Ill. App. 17, 65 N. E. (2d) 212 (1946); Craig v. Tucker, 264 Ill. App. 521 (1932).

[26] 395 Ill. 238, 69 N. E. (2d) 875 (1946).

[27] The explanation is, however, one which corresponds with the facts. The Illinois cases listed in note 22, ante, are all Industrial Commission cases with one exception.

[28] Baty, Vicarious Liability, Ch. VIII.

[29] Seager, Principles of Economics, p. 601.

be expected to owe greater responsibilities to third persons who have been injured by their deviating servants than to such servants themselves.

Nevertheless, there remains the possibility that some new concept might be adopted which could afford a more equitable solution. If it is too harsh to hold the employer responsible because of a mere turning by the deviating employee in the direction of the employer's place of business, a more reasonable solution[30] would be to adopt the foreseeability test now applied in many tort negligence cases. Under it, an employer could be held liable whenever the employee has entered the foreseeable zone, that is the area within which an employer could reasonably expect his employees to deviate during the course of their employment. Applying such a standard to the instant case, the driver might well have been considered outside the zone of reasonable deviation for it could be said, as a matter of law, that no employer would foresee that an employee would still be acting within the scope of his employment when he was miles from his place of work and more than seven hours overdue.

W. J. MOORE

WORKMEN'S COMPENSATION—EFFECT OF ACT ON OTHER STATUTORY OR COMMON-LAW RIGHTS AND DEFENSES—WHETHER THE ILLINOIS WORKMEN'S COMPENSATION ACT UNCONSTITUTIONALLY DEPRIVES COVERED EMPLOYEE OF HIS RIGHT OF ACTION AGAINST COVERED THIRD PARTIES WHO CAUSE EMPLOYEE'S INJURY OR DEATH—As a result of a motor vehicle collision caused by the alleged negligence of one of defendant's employees, the plaintiff and his employer, in the recent case of *Grasse* v. *Dealer's Transport Company*,[1] instituted proceedings to recover damages. The first count of the complaint, which was in two counts, presented an ordinary common-law negligence claim on behalf of the injured employee. The second count, offered by the employer, presented a reimbursement claim covering items paid to the injured employee by way of workmen's compensation. The defendant's answer to the first count, relying upon the first paragraph of Section 29 of the Illinois Workmen's Compensation Act,[2] asserted that the injured employee was without legal capacity to bring such an action. A motion by the employee-plaintiff to strike the answer, on the ground that the provision in question, when construed with Section 3 of the same statute,[3] was contrary to both the federal and

[30] The solution is partly suggested in a note in 23 Col. L. Rev. 444 (1923).

[1] 412 Ill. 179, 106 N. E. (2d) 124 (1952).

[2] Although the defense relied particularly on Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 166, the text thereof was incorporated in the 1951 revision of the Workmen's Compensation Act: Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.5(b).

[3] Same as Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.3.

the state constitutions, was denied in the trial court and the first count of the complaint was dismissed without prejudice to the pending cause of action of the employer. On direct appeal to the Illinois Supreme Court,[4] that judgment was reversed, and the cause was remanded with directions to reinstate the first count, when the high court concluded that the particular provision, as applied to the situation before it, was unconstitutional by reason of being an arbitrary and capricious attempt to create classifications not warranted in law.[5]

The phraseology of the questioned portion of the statute purported to declare that, when an employee under the act had been injured in the course of his employment through the negligence of a third-party tort-feasor also under the act, the employee was to be denied his common-law right of action against such person and was limited to the recovery of compensation only, and then solely from his employer. The injured employee's common-law rights against the tort-feasor were said to be transferred to his employer but in an altered form, the employer being authorized to sue the covered third-party tort-feasor, as if by way of subrogation, for the amount of compensation paid or due to the injured employee. The substitute proceeding would, however, be successful only if all the elements of a common-law negligence action were proved.[6] Naturally, the employer was to be barred from bringing the derivative action until the amount of compensation to be paid to the injured employee had been fixed,[7] so it might sometime result in an employer being barred from obtaining reimbursement if he should be forced to litigate with his injured employee for a period longer than that permitted for the institution of a personal injury action.[8]

In contrast thereto, under the second and third paragraphs of Section 29, a covered employee may sue a non-covered third-party tort-feasor for appropriate damages in an ordinary common-law negligence action, which right of action is not transferred to the employer even though he remains liable to pay compensation to his injured employee. The employer in this instance, however, is granted a lien, for reimbursement purposes, on the

[4] Direct appeal is authorized by Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199(1).

[5] The court carefully noted that its holding was limited to the issue before it and did not operate to render unconstitutional the general scheme for workmen's compensation: 412 Ill. 179 at 202, 106 N. E. (2d) 124 at 135 et seq. See also Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.25, which contains the customary clause as to partial invalidity, and Baim v. Fleck, 406 Ill. 193, 92 N. E. (2d) 770 (1950).

[6] City of Taylorville v. Central Illinois Public Service Co., 301 Ill. 157, 133 N. E. 270 (1922).

[7] Schlitz Brewing Co. v. Chicago Railways Co., 307 Ill. 322, 138 N. E. 658 (1923).

[8] Under Ill. Rev. Stat. 1951, Vol. 2, Ch. 83, § 15. a personal injury action must be begun within two years; a wrongful death suit, by ibid., Vol. 1, Ch. 70, § 2, must be instituted within one year from the date of death. The injured employee, however, has one year in which to institute compensation proceedings: Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.6.

amount of damages recovered by his employee up to the extent of the amount of compensation he has been required to pay the employee. If the employee should fail to institute suit against the third-party tort-feasor within a specified time, the employer is expressly granted the right to do so for the benefit of both the employer and the employee.[9]

These two schemes, when construed with Section 3 of the Illinois Workmen's Compensation Act, one which automatically imposes the provisions thereof on all employers and employees engaged, as here, in hazardous occupations, serve to create a series of compulsory classifications which turn on the circumstance of whether or not the third-party tort-feasor is also covered by the statute. For example, the arrangement (1) distinguishes covered third-party tort-feasors from all other tort-feasors by limiting their liability for injuries to covered employees; (2) separates covered employees injured by covered third-party tort-feasors from covered employees injured by third-party tort-feasors not bound by the act, limiting the recovery of the former to the fixed amount of compensation while allowing the latter the full remedy of the common-law negligence action; and (3) segregates covered employers whose employees are injured by covered third-party tort-feasors from covered employers whose employees are injured by third-party tort-feasors not bound by the act, limiting the remedy of the former while granting a full and complete remedy to the latter.

In the course of its opinion, the court compellingly demonstrated that classifications of the character in question were arbitrary as the purported bases of the several distinctions were in no way related to the nature of the tort-feasor's act nor turned on any legal relationship between the tort-feasor and the injured employee. It therefore necessarily found that the first paragraph of Section 29, when construed with Section 3 of the act, violated federal guarantees of due process of law and equal protection of the laws as well as state constitutional provisions intended to prevent the passage of special laws granting special privileges and designed to insure that each individual should find a remedy in law for all injuries and wrongs.[10]

By its decision, however, the court has exposed a number of other problems which must be resolved. When the specific provision was first enacted, in 1913, its validity was then sustained on the basis it was part of an entirely elective act. Certainly, no employee could claim an un-

[9] Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.5(b). A leeway of three months is given to the employer to begin suit before the expiration of the appropriate limitation period which would attach to a suit by the employee. As to the effect of the employee's suit against the third person on the employer's cause of action, see Melohn v. Ganley, 344 Ill. App. 316, 100 N. E. (2d) 780 (1951), noted in 40 Ill. B. J. 238.

[10] Ill. Const. 1870, Art. IV, § 22, and Art. II, § 19.

constitutional deprivation of his rights if he made a voluntary waiver thereof at the time he entered into a contractual relationship with his employer.[11] While most employers and employees are now under the act by compulsion, there remain circumstances under which they may come in by election.[12] It is not clear, from the decision in the instant case, whether the nullified portion of the statute is to remain in effect as to these parties since the decision deals solely with the question of the combined effect of Sections 3 and 29. There would be fair reason to suppose that the law has not been changed in this respect, but that remains to be seen.

It may be that the limited liability heretofore afforded covered third-party tort-feasors may have operated to win the support of employers for the act as a whole, but it is more likely that the subrogation features of the paragraph in question, features designed to aid in the reimbursement of any employer for compensation he may have paid to his injured employee, had even greater bearing. The invalidation of the first paragraph of Section 29 has now undermined that support for it leaves the employer of an employee injured by a covered third-party tort-feasor without any statutory guarantee of reimbursement. At best, he is left with the possible remedy of subrogation, but it may or may not prove adequate as the right to determine whether to sue the third person rests in the employee's hands and he, satisfied with the receipt of workmen's compensation, may elect not to sue.[13] The second and third paragraphs of Section 29 specifically provide only for the circumstance of the uncovered third-party tort-feasor and in no way could be interpreted to support suit by employer against the covered third-party. In effect, the law, as it now stands, distinguishes covered employers whose employees are injured by covered third-party tort-feasors from those whose employees are injured by third-party tort-feasors not bound by the act, affording a more adequate remedy to the latter by express statutory mandate than is given to the former.

These problems, and related issues, would indicate the need for action by the Illinois legislature to dispel the confusion and injustice that can follow in the wake of the instant decision. One possible solution is suggested by the history of a similar portion of the Alabama workmen's compensation statute. In 1947, that portion of the Alabama act referring to

11 Keeran v. Peoria, Bloomington & Champaign Traction Co., 277 Ill. 413, 115 N. E. 636 (1917).

12 Ill. Rev. Stat. 1951, Vol. 1, Ch. 48, § 138.2.

13 It may be significant that there is no recorded case in Illinois where an employer has maintained a subrogation action on facts like those in the instant case. The holding in Weaver v. Hodge, 406 Ill. 537, 94 N. E. (2d) 297 (1950), noted in 29 CHICAGO-KENT LAW REVIEW 284-5, may illustrate some of the attendant difficulties.

covered third-party tort-feasors was repealed[14] and the segment of the act of that state dealing with uncovered third-party tort-feasors was modified to apply to all tort-feasors who harmed employees.[15] A similar revision of the second and third paragraphs of Section 29 of the Illinois Workmen's Compensation Act would assure equal treatment to all employers forced to pay compensation without depriving the covered employees of their right to pursue common-law actions for negligence against those who harm them. After such an amendment, Illinois would stand with the majority of states, none of whom distinguish between covered and uncovered third-party tort-feasors.

P. PAVALON

[14] Ala. Code 1940, Tit. 26, § 311, repealed by Acts 1947, p. 485.
[15] Ala. Code 1951, Tit. 26, § 312.